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No. 82-215

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

WHITING POOLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Simply put, our position in this case is that nothing in the language of the new Bankruptcy Code or its legislative history supports the proposition that Congress intended to alter the prior settled rule that property seized by levy to satisfy a debtor's delinquent federal tax liabilities *prior* to the filing of the bankruptcy petition is not to be included in the bankruptcy estate. Indeed, the plain language and the legislative history support the opposite conclusion.[1] Hence,

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[1]As we explained in detail in our opening brief (at 13-15), Section 542(a) requires an entity to turn over property that the trustee may use, sell or lease under Section 363. In turn, Section 363(b) and (c) specify that the trustee may use, sell or lease "property of the estate." As the legislative history indicates, Section 541 defines "property of the estate." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 367 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 82 (1978). Accordingly, Section 542(a)

we submit that a bankruptcy court in a reorganization proceeding under Chapter 11 of the new Bankruptcy Code may not compel the government, pursuant to 11 U.S.C. (Supp. IV) 542(a), to turn over to the debtor-in-possession property which the government seized by levy to satisfy the debtor's tax liabilities prior to the filing of the bankruptcy petition.

In response, respondent counters (Br. 4, 12-15, 42-43) that if the judgment below is reversed in accordance with our submission, then Section 542(a) of the Bankruptcy Code could never be invoked by a trustee to obtain repossessed collateral in the hands of a secured creditor. That, however, is not the necessary consequence of a decision in favor of the government here. The only question presented for decision in this case is whether the tax collector must turn over property seized by a pre-bankruptcy tax levy. And contrary to respondent's contention, that issue is not inextricably tied to the resolution of the further question respondent seeks to raise as to whether other creditors must surrender repossessed collateral.

As we pointed out in our opening brief (at 8-9), the court of appeals' analysis proceeded upon a three-step syllogism. First, the court noted that under Chapters X and and XII of the prior bankruptcy law, a bankruptcy court could order secured creditors to turn over repossessed property to the reorganizing debtor. Although the court of appeals acknowledged that Congress did not enact specific provisions in the new Bankruptcy Code that were comparable to the prior

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requires an entity to turn over the debtor's legal and equitable interests in property as of the date the petition is filed. As we further pointed out, the debtor's interests in property that has been seized by a tax levy are limited to a right to redeem, a right to surplus proceeds of sale, if any, and a right to receive notice of sale. Those are the sole interests that passed to the debtor's estate and, thus, the trustee had no right to use, sell or lease the seized property.

law, it believed that Congess could not have intended to discontinue that authority (see Pet. App. 13a-17a). The second step in the court's reasoning was to analogize the government's position after a tax levy to that of a secured creditor who had repossessed the debtor's property. Finally, the court concluded that the debtor is as entitled to turnover of property seized to satisfy delinquent taxes as it is to turnover of collateral in the possession of a secured creditor.

But even assuming arguendo that the court of appeals correctly inferred that Congress intended to incorporate in the new Bankruptcy Code a turnover rule with respect to secured creditors despite its failure to employ language that explicitly requires that result, it does not automatically follow that Congress also intended to require the government to surrender property seized prior to bankruptcy to satisfy delinquent taxes. As we pointed out in detail in our opening brief (at 29-39), in enacting the new Bankruptcy Code, Congress was sensitive to the impact of the bankruptcy laws upon the functioning of the tax collection system and paid careful attention to the changes in bankruptcy laws that affected the collection of taxes. Nevertheless, the legislative history does not even suggest, much less state, that Congress intended to alter the prior law governing the effect of pre-bankruptcy tax levies. Under that prior law, it was clear that the government was not required to surrender to the trustee for inclusion in the bankruptcy estate property seized prior to bankruptcy to satisfy delinquent taxes. See *Phelps* v. *United States*, 421 U.S. 330 (1975); *In re Pittsburgh Penguins Partners*, 598 F.2d 1299 (3d Cir. 1979). In these circumstances, there is no basis for assuming that Congress made a drastic change in the law with respect to

pre-bankruptcy tax levies, without any mention of its intent to do so.[2]

Furthermore, in treating the cases of the secured creditor and the government's seizure of property by tax levy as though they were inseparable, respondent ignores the basis of the holding below. The court of appeals did not extract the substantive rule that secured creditors must surrender repossessed collateral from the express terms of the relevant statutes. Indeed, the statutory language could not be read to support that result. Rather, it reasoned that because a

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[2]In respondent's view (Br. 24-28), Section 541 is a self-executing provision that automatically brings within the bankruptcy estate the property it enumerates, while Section 542(a) requires an entity to turn over a separate class of property that is defined by Section 363. However, the legislative history of Section 541 makes it clear that "[t]his section defines property of the estate, and specifies what property becomes property of the estate." H.R. Rep. No. 95-595, *supra*, at 367; S. Rep. No. 95-989, *supra*, at 82. The legislative history of Section 363, on the other hand, does not suggest that Congress intended to define a separate category or class of property that is to be included in the bankruptcy estate. To the contrary, the terms of Section 363 indicate that the trustee may use, sell or lease "property of the estate," if the other requirements of the Section are met. 11 U.S.C. (Supp. IV) 363(b) and (c). Moreover, as relevant here, Section 542(a) directs that an entity must relinquish to the trustee property "that the trustee may use, sell, or lease under section 363 of this title." Thus, an entity must turn over pursuant to Section 542(a) only "property of the estate" that the trustee is entitled to use, sell or lease under Section 363.

Finally, respondent also suggests (Br. 10, 25-26) that Congress intended items of property in which the debtor has an interest to be included in the estate, rather than including only the debtor's interests in property, and that the test whether property is to be included in the estate should be whether the debtor has a "substantial" interest in it. The comments of the principal congressional sponsors made just prior to enactment of the Bankruptcy Code are precisely to the contrary. Section 541 is an "all embracing definition" which includes all "beneficial rights and interests" that the debtor may have, but "*only the debtor's interests* in such property becomes property of the estate." See, *e.g.*, 124 Cong. Rec. 32399, 33999 (1978) (emphasis supplied). See also S. Rep. No. 95-989, *supra*, at 92; H.R. Rep. No. 95-595, *supra* at 367-369.

trustee's ability to obtain repossessed collateral for inclusion in the bankruptcy estate was such an important tool of reorganization under Chapter X of prior law (*Reconstruction Finance Corp.* v. *Kaplan*, 185 F.2d 791 (1st Cir. 1950)), Congress could not have intentionally omitted it in the new Bankruptcy Code (see Pet. App. 13a-15a). It supported its view that Congress intended to require secured creditors to surrender repossessed collateral by the statements of witnesses who urged Congress to incorporate that rule in the Bankruptcy Code.

But the plain fact of the matter is that Congress did not enact the witnesses' proposals. Nevertheless, despite Congress' rejection of the National Bankruptcy Conference's proposal to make a turnover rule explicit with respect to secured creditors,[3] the court of appeals believed that the

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[3]As we indicated in our opening brief (at 43-44), Congress rejected the National Bankruptcy Conference's proposal. Under that proposal, Section 543, which requires a custodian to turn over property of the debtor that came into the custodian's possession prior to bankruptcy, would have been amended to require a creditor to turn over property of the debtor in the creditor's possession when the bankruptcy case was commenced. See Pet. App. 21a n.16.

Section 543, as enacted, is similar in scope to Sections 257 and 507 of prior law (Act of June 22, 1938, ch. 575, 52 Stat. 902 and 927, 11 U.S.C. 657 and 907). As we indicated in detail in our opening brief (at 29-30), Sections 257 and 507 explicitly required a "trustee under a trust deed or a mortgagee under a mortgage" to relinquish to the trustee property in their possession. Section 543 requires a "custodian" to surrender property to the trustee and the term custodian is defined by Section 101(10) as a—

> (A) receiver or trustee of any property of the debtor, appointed in a case or proceeding not under this title;
>
> (B) assignee under a general assignment for the benefit of the debtor's creditor's; or
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors * * *.

subsequent addition of Section 542(a) was intended to satisfy the witnesses' requests. While it is questionable to infer that Congress endorsed the witnesses' views with respect to repossessed collateral, it is wholly unwarranted to conclude that Congress also intended to extend the rule with respect to repossessed collateral to the discrete context of federal tax levies. Plainly, obtaining property seized by a pre-bankruptcy tax levy was not an important tool of reorganization proceedings under prior law. Indeed, such property was not included in bankruptcy estates. Furthermore, none of the statements relied upon by the court below or cited by respondent (Br. 32-34) indicate that the witnesses believed it necessary or appropriate to change the law in this regard. And neither the court of appeals, nor respondent, has cited any pertinent legislative history reflecting Congress' intent to change the law with regard to pre-bankruptcy tax levies. There is accordingly no reliable basis for the assumption made by the court below that Congress intended to include property seized by a pre-bankruptcy tax levy within the compass of any prior rule that may continue to exist for collateral repossessed by private creditors.[4]

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[4]Respondent urges (Br. 43-46) that in ordering the government to turn over the seized property to the trustee, the bankruptcy court provided adequate protection for the government's interests by conditioning the delivery of the property upon respondent's payment to the government of $20,000 (see Pet. App. 39a-43a). But as we explained in detail in our opening brief (at 4 n.1), this payment included $15,000 from a bank account that was itself the subject of a pre-petition tax levy. See also Pet. App. 31a & n.21. Hence, to a large extent, the "adequate protection" which respondent is willing to confer on the government involves simply putting up the government's own property as security to insure that respondent will not dissipate other property seized by the government for back taxes.

At all events, the issue of adequate protection is not before the Court for even the court of appeals refrained from adopting respondent's argument on this point. In reversing the district court (which had

CONCLUSION

For the reasons stated above, and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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reversed the bankruptcy court's turnover order), the court of appeals remanded the case with instructions to the bankruptcy court to address and redetermine the issue of the adequacy of the protection before any new turnover order is issued (Pet. App. 2a, 31a-32a).

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